United Nations AT/DEC/1181

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1181

Case No. 1274: ABU KASHEF Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, First Vice-President, presiding; Ms. Brigitte Stern, Second Vice-President; Ms. Jacqueline R. Scott;

Whereas, on 22 April 2002, Jamal Abu Kashef, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 18 September 2002, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"PART II

The Pleas

A) ... I request the rescission of the decision of the Director of UNRWA Operations ... to terminate me ...

b) I request that I be reinstated in my former position as Principal, Gaza Training Centre, or in one comparable to it ... I also request that all references to my termination be removed from my personal file.

c) I request that the Tribunal require the Commissioner- General of UNRWA to pay me all my salaries due since [the] date of my termination from UNRWA ... until [the] date of my prospective reinstatement ...

d) I further request that all funds lost from my pension or provident fund due to my unjust dismissal as of 29 March 2000 be restored to me ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2003 and periodically thereafter until 30 November 2003;

Whereas the Respondent filed his Answer on 30 November 2003;

Whereas the Applicant filed Written Observations on 12 February 2004;

Whereas on 8 June 2004, the Applicant submitted an additional communication and on 25 June 2004, the Respondent commented thereon;

Whereas the facts in the case are as follows:

The Applicant joined UNRWA on a temporary indefinite appointment as an Area staff member, in the capacity of Senior VT Instructor (Building), grade 11, at the Gaza Training Centre, Gaza, on 1 September 1984. Effective 1 January 1996, the Applicant was promoted to the post of Principal, Gaza Training Centre, at grade 16. His promotion was subject to a twelve-month probationary period.

The Applicant's performance evaluation report (PER) for the period January to December 1996 ("first PER") reflected "A Performance that Does Not Fully Meet Standards" and an indication by the Applicant's supervisor, the Chief, Field Education Programme, Gaza, (CFEP) that this would be discussed "soon because [the supervisor] was on sick leave". The Applicant signed the PER and was given a copy thereof.

On 10 March 1997, the Applicant was informed that, in view of his performance, his appointment as Principal, Gaza Training Centre, would not be confirmed and that his probationary period had been extended by an additional six months, until 30 June 1997, at which time a new PER would be issued. He was further informed that failure to obtain a satisfactory PER at that time could result in termination of his services. The Applicant's subsequent PER ("second PER") reflected "A Satisfactory Performance".

On 4 July 1999, the Applicant was served with a written censure for discussing a policy matter directly with the Director of Education, Headquarters, Amman, thus bypassing his supervisor. The Applicant did not appeal the written censure.

The Applicant's PER for the period August 1998 to June 1999 ("third PER") was completed on 28 August 1999 and reflected "A Performance that Does Not Fully Meet Standards". Subsequently, on 16 September, the Applicant was informed that, since he had displayed serious deficiencies and inadequacies, both in the quality and quantity of accomplished work, as well as in his personal integrity and judgment, his annual increment would be deferred for six months. He was further cautioned that this was a final warning and that failure to obtain a satisfactory evaluation on a new PER, which would be issued on 1 January 2000, might lead to the termination of his service.

On 19 January 2000, the Field Administration Officer, Gaza, (FAO) informed the Director, UNRWA Operations, Gaza, that the Applicant had misused his United Nations Laissez-Passer (UNLP), which had been given to him for duty travel to Amman; the Applicant had used the UNLP for private travel to Syria and Lebanon and had obtained a Syrian visa through the UNRWA Travel Assistant in Amman by stating that he was going to Syria on duty. Additionally, the Applicant had claimed 8 December 1999 as a "duty day", while, in fact, he was in Syria.

The Applicant's subsequent PER, covering the period from July to December 1999 ("fourth PER") again reflected "A Performance that Does Not Fully Meet Standards".

On 2 February 2000, the Applicant wrote to the Director, UNRWA Operations, Gaza, requesting to meet with him and explaining that he had travelled to Lebanon, at his own expense, while using his UNLP, in order to visit Siblin Training Centre to exchange experiences. The Applicant further expressed his concern that adverse documents, containing incorrect information, might have been placed in his file without his knowledge.

On 27 February 2000, the Applicant was officially informed of the findings of an investigation carried out by the FAO in respect of the events which had taken place in December 1999. On 2 March, the Applicant responded, stating, inter alia, that he had travelled to Lebanon and Syria in the interest of the Agency, not in his own interest.

On 13 March 2000, the Applicant wrote to the Director, UNRWA Operations, Gaza, expressing his concern that since his appointment to his current post, he had not had an opportunity to discuss his performance with his supervisor, the CFEP. On 20 March, the Director, UNRWA Operations, Gaza, responded that, according to the CFEP, he had had discussions with the Applicant concerning his performance on several occasions; that, in addition, the Applicant's attention had been drawn to his shortcomings; and, that, on 16 September 1999, he had received a final warning. On 22 March, the Applicant replied, insisting that his PERs had not been discussed with him and that he had not received the 16 September letter.

On 28 March 2000, the Applicant was informed that his comments concerning his travel to Amman had failed to provide a convincing explanation for misusing the UNLP and that this incident was part of a pattern of unsatisfactory professional conduct and performance during the last few years. It had therefore been decided to terminate his services in the interest of the Agency under Area staff regulation 9.1, effective 29 March 2000.

On 9 April 2000, the Applicant requested the Director, UNRWA Operations, Gaza, to reconsider the decision to terminate his services. On 13 April, he was informed that the decision stood.

On 10 May 2000, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in Amman. The JAB adopted its report on 25 September 2001. Its evaluation and judgement, and recommendation read, in part, as follows:

> "III. EVALUATION AND JUDGMENT
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> 39. ...
>
> a) The Board noted that the termination of the Appellant's appointment was based on incidents that do not necessitate such a severe measure
>
> b) The Board also noted the Appellant was served with a letter of censure only because he contacted the Director of Education without going through proper channels, which is an act that should have not led to such a disciplinary measure.
>
> c) The Board noted that the letter of final warning was not signed by the Appellant. This casts doubt on whether the Appellant had received the letter. Moreover the performance evaluation report that led to the letter of final warning was neither discussed with ... nor signed by the Appellant.
>
> d) The Board examined the Appellant's Performance Evaluation Reports and noted inconsistencies and irregularities in completing various sections of some reports:
>
> ...
>
> e) The Board would like to point out that the use of the UNLP for travel to Syria and Lebanon does not entail termination.
>
> f) In this context the Board established that the Appellant's termination was provoked by bias and prejudice against him and that the disciplinary measure was harsh.
>
> IV. RECOMMENDATION
>
> 40. In view of the forgoing ... the Board unanimously makes its recommendation that the Administration's decision appealed against be reviewed."

On 23 January 2002, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him, inter alia, as follows:

"In contrast to the Board's view, I believe that your inadequate performance, as reflected in the fourth and fifth PERs, was a sufficient basis for the termination measure. The Board doubted that you should have received a letter of censure for having contacted the Director of Education directly, without going through the proper channels. The propriety of the censure was not before the Board. Your misuse of the UNLP in December 1999 was also a serious issue as the use of UNLPs is carefully regulated. As a senior staff member your behaviour in this matter was unacceptable.

I do not accept that irregularities in connection with your PERs were either significant or support a finding of 'bias and prejudice'.

Thus, I believe that the Board's conclusion, that the decision was not appropriate and there was prejudice and bias against you, is not supported by the evidence. In view of the foregoing, I cannot accept the recommendation of the Joint Appeals Board. ... "

On 18 September 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's service is disproportionate considering the reason cited as the basis for his termination.

2. The Applicant's PERs were not discussed with him and there were irregularities in completing various sections of his PERs.

3. The Applicant did not have a personal interest in going to Lebanon and Syria but w[illegible]t in the interest of UNRWA. The Applicant travelled while on annual leave, at his own expense, and followed the known practice of using the UNLP for the purpose of this trip, as well as for the official trip to Amman.

4. The decision to terminate the Applicant was the result of bias and prejudice against him.

Whereas the Respondent's principal contentions are:

1. The termination of the Applicant's services in the interest of the Agency was a proper exercise of managerial discretion.

2. The Applicant has not discharged the burden of establishing that the decision was tainted by prejudice or bias.

3. The Applicant's inadequate performance, as reflected in his PERs, was sufficient basis for the termination of his appointment.

4. The termination decision was also based on the UNLP incident. The Applicant was a senior staff member, a role model for others, and his behaviour in this matter

was unacceptable. His acts reflected a lack of maturity, seriousness and honesty that, in the Agency's view, was incompatible with his continued service as an international civil servant.

5. The Respondent concedes that there were irregularities in some of the Applicant's PERs, but those irregularities were not so significant as to taint the Applicant's termination and certainly do not support a finding of "bias and prejudice".

The Tribunal, having deliberated from 28 June to 23 July 2004, now pronounces the following Judgement:

I. The Applicant contests the decision of the Respondent to terminate his services from UNRWA in the interest of the Agency under the provisions of Area staff regulation 9.1, citing both the Applicant's alleged poor performance and unsatisfactory conduct. The Applicant requests reinstatement to his former post or to a comparable post and that he be remunerated retroactively from the date of reinstatement, including contributions to his provident fund.

II. Area staff regulation 9.1 provides that "[t]he Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency".

III. In addressing the issue of whether the Respondent's decision to terminate was properly within the exercise of the Respondent's managerial discretion, the Tribunal has previously held that the Commissioner-General has the discretion to make managerial decisions with regard to staff members. (See Judgements No. 681, *Maqari* (1994); No. 682, *Dabit* (1994); and, No. 709, *Nabhan* (1995).) This managerial discretion, however, is not unfettered, and "[a]dministrative decisions affecting a staff member must not run counter to certain concepts fundamental to the Organization. They must not be improperly motivated, they must not violate due process, they must not be arbitrary, taken in bad faith or discriminatory". (See Judgement No. 1134, *Gomes* (2003), citing Judgement No. 981, *Masri* (2000).) Where a staff member seeks to vitiate the Respondent's decision on the basis of prejudice, improper motive or other extraneous factors, the burden of proving such prejudice or improper motive is on the staff member, who must adduce convincing evidence. (See Judgment No. 834, *Kumar* (1997).) Thus, the Tribunal must consider whether the Respondent's exercise of discretion was vitiated by any violation of due process or by any arbitrariness, bad faith, discrimination or other such extraneous factors.

IV. The Tribunal first examines the Respondent's assertion that the termination would have been justified on the basis of the Applicant's poor performance. The Tribunal notes the

performance history of the Applicant. In early 1996, the Applicant was promoted to Principal, Gaza Training Center, and nine months later, the CFEP became his supervisor. Prior to 1996, when the CFEP became the Applicant's supervisor, the Applicant had generally received good performance evaluations; in the four years preceding the arrival of the CFEP, the Applicant had received above average performance evaluations. The Tribunal does recognize that during these four years the Applicant held a position less senior than the one from which he was terminated.

The Applicant asserts that the PERs he received at the hand of the CFEP and the subsequent decision to terminate his services, as well as various other disciplinary measures taken against him, were motivated by his supervisor's intent to "get rid of [the Applicant] because [the supervisor] had inherited [the Applicant] from his predecessor ..."

V. The Tribunal finds no evidence of discrimination or improper motive vis-à-vis the Applicant's PERs. The first PER written by the CFEP with respect to the Applicant raises some questions. It was written after only 1 or 2 months of supervision, too short a time period in which to reasonably evaluate a staff member. In addition, the overall rating of "does not fully meet standards" does not comport with the individual average and above average ratings the PER reflects for specific categories (e.g., punctuality, quantity of work, initiative, etc.). However, the validity of the PER was not challenged by the Applicant through the rebuttal process at the appropriate time. Likewise, the Applicant did not seem to rebut subsequent PERs of which he complains. Having failed to rebut the PERs, the Applicant is deemed to have accepted them. Moreover, the Tribunal notes that the next two PERs, issued by the CFEP over the next two years, were, respectively, "Satisfactory" and "A Rather Good Performance". If the CFEP were trying to "get rid of" the Applicant, as the Applicant suggests, the CFEP would undoubtedly have issued consistently adverse PERs.

VI. Thus, the Applicant fails to present evidence sufficient to compel a finding that the Respondent's decision to terminate was based on discrimination or improper motivation. Thus, the Respondent's decision to terminate the Applicant's services "in the interest of the Agency", insofar as it relied on the Applicant's poor performance, as reflected in his PERs, was within the bounds of the Respondent's managerial discretion.

VII. The Tribunal now turns to the issue of whether the Respondent's decision to terminate the Applicant, also would have been justified based on the Applicant's misconduct, and this was similarly within the managerial discretion of the Respondent. The Tribunal notes that the misuse of the UNLP was but one instance of misconduct (along with poor

performance) cited by the Respondent as the basis for the Applicant's termination; the Applicant previously had been engaged in several other incidents of conduct which the Respondent found unsatisfactory and for which the Applicant was disciplined. The misuse of the UNLP was simply the "straw that broke the camel's back"; the death k il to the Applicant's service with the United Nations.

VIII. In attempting to defend his use of the UNLP to travel to Syria and Lebanon, which the Applicant himself concedes was not authorized, the Applicant alleges that others have similarly used the UNLP as he did, without suffering any adverse consequences, and that unduly harsh discipline in the form of termination was meted out to him alone. This was the conclusion reached by the JAB, which concluded that "the use of the UNLP for travel to Syria and Lebanon does not entail termination."

IX. While the Tribunal recognizes the sometimes casual way in which the UNLP may actually be used, the Tribunal cannot dispute the Respondent's right to take such alleged violation of the rules governing the use of the UNLP with the utmost seriousness and to impose the ultimate sanction on violators, provided he does not act in a discriminatory fashion and is not improperly motivated. The Tribunal finds that the Applicant has failed to produce any evidence that the Respondent's decision to terminate him, was arbitrary, capricious, improperly motivated or that others were treated differently in the same circumstances. Thus, the Tribunal finds that the Respondent's decision to terminate the Applicant, insofar as it relied on the Applicant's unsatisfactory conduct, of which the misuse of the UNLP was but one incident, was within the Respondent's managerial discretion.

X. The Tribunal next turns to the issue of procedural irregularities with respect to the Applicant's PERs. The Tribunal concurs with the Respondent in this regard that, while certain procedural irregularities did exist, they were not material and they did not result in adverse consequences to the Applicant. It is clear from the record that the Applicant knew of the alleged performance and conduct shortcomings in a timely fashion, and the procedural irregularities did not prejudice his position, then or now.

XI. Finally, the Tribunal addresses the Applicant's contention that he never received the 16 September 1999 letter issuing a "final warning" to him. The Tribunal finds it difficult to conclude that the Applicant did not receive that letter, in that he appears to have received other communications sent to him during the same time period. At any rate, the Applicant knew that his annual increment had not been paid, and that should have put him on notice that

something was amiss. The Applicant was warned about his performance and conduct as early as March 1997, and in several subsequent instances, and it should have come as no surprise to him that his tenure at UNWRA was tenuous in light of these warnings.

XII. In view of the foregoing, the Application is rejected in its entirety.

(*Signatures*)

Kevin **Haugh**
First Vice-President, presiding

Brigitte **Stern**
Second Vice-President

Jacqueline R. **Scott**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary